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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

Unpublished Opinion No. 2026-UP-317  
(S.C. Ct. App. filed June 24, 2026, Pet. Reh'g Den'd Aug. 24, 2026)  
Appellate Case No. 2025-000364

Richard A. Gorman . . . . . Respondent,

v.

John C. Monarch . . . . . Petitioner.

PETITION FOR WRIT OF CERTIORARI

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**CERTIFICATION OF PETITIONER’S COUNSEL**

The undersigned counsel for Petitioner hereby certifies and affirms that a petition for rehearing from the decision of the Court of Appeals for which this writ of certiorari is sought was made in a timely fashion, and that it was finally ruled upon by the Court of Appeals on August 24, 2026. Thirty (30) days after such date occurs on September 23, 2026.

**STATEMENT OF QUESTIONS PRESENTED FOR REVIEW**

- I. Did the Court of Appeals err in affirming terminating sanctions without applying Rule 37(f), SCRCp, where the forensic evidence distinguished automatic loss of electronically stored information from intentional deletion and the court did not determine whether the information for which sanctions were imposed was lost through the routine, good-faith operation of an electronic information system?
- II. Where a circuit court issues a conditional order to strike a party's pleadings unless he complies with a specified discovery order requiring forensic examination of electronic devices, and the court-ordered forensic examination thereafter occurs, does the existence of the prior order lower the standard for imposing the threatened sanctions for different conduct that predated the order and was never made the subject of a comparable warning?
- III. May a court dismiss an affirmative permissive counterclaim as a discovery sanction without determining how the particular discovery misconduct prejudiced the opposing party's ability to defend that counterclaim and why dismissal of the counterclaim was necessary to remedy that prejudice?
- IV. May presumed prejudice alone support a terminating discovery sanction without determining the degree of prejudice caused by the information allegedly lost and whether that prejudice could be cured by a lesser sanction?

### STATEMENT OF THE CASE

Striking a party's pleadings is the ultimate discovery sanction in civil litigation, a remedy which the appellate courts have characterized as "harsh medicine," comparable to a "hydrogen bomb." It is a sanction of last resort, to be used only reluctantly and with great caution. It has been imposed rarely, and when it has been imposed, it has almost always been preceded by a specific warning that failure to comply with a specific condition would result in the pleadings being stricken.

This case presents an unusual deviation from this pattern. Here, the circuit court issued a warning that if Petitioner failed to turn over certain electronic devices to an independent forensic examiner within a specific amount of time, his pleadings would be stricken and he would be fined \$7500.

Petitioner had grave misgivings about the order, which he contended did not adequately protect his privacy and privileged information, but having exhausted every legal option at his disposal to challenge the order, he complied. The devices were reviewed, and thousands of files relevant to this case were extracted by the neutral expert. However, when the files did not yield the evidence that Respondent had hoped to discover, he again moved for sanctions, alleging that Petitioner had submitted the wrong device. Petitioner responded with proof that he had submitted the correct device, and the circuit court denied the motion for sanctions.

Yet twenty-one months later, the circuit court imposed the very sanctions that had been conditionally threatened. Although it found that Petitioner's conduct had "severely hamper[ed]" Respondent's ability to prove his case, it did not identify the material evidentiary deficit remaining after the forensic production or explain why lesser sanctions could not cure it. The court struck

Petitioner's answer and counterclaim, declared him in default, and imposed the \$7500 fine. (R. 94-106.)

The court did not base that ruling on Petitioner's failure to timely submit the laptop for the ordered forensic examination. Instead, it relied on earlier discovery conduct, including Petitioner's alleged failure to preserve data integrity following a December 2013 preservation letter and to identify other devices, delay associated with motions and appeals, and failure to preserve a later instant-message exchange with a third party. (R. 101-03.) Three different experts submitted reports and affidavits offering varied and conflicting opinions about whether Petitioner had removed relevant information from his devices and when this had occurred. Without any live testimony or examination of these witnesses, the court made a credibility determination in favor of Respondent's position, while acknowledging that it could not "determine at what point this data was removed or destroyed." (R. 100-01.) It rejected a lesser sanction in part because it reasoned that to impose "anything less" than the previously-threatened sanction striking Petitioner's pleadings would "diminish the authority of this Court and its Order." (R. 104.) In other words, the court used the fact that it had issued an order threatening terminal sanctions to justify imposing those sanctions for conduct that was not the subject of the order, and that had occurred *before* the order was issued.

The Court of Appeals affirmed in an unpublished per curiam opinion. It deferred to the circuit court's factual and credibility findings, treated prejudice as presumptive once discovery rights were "trampled," and found no abuse of discretion in rejecting lesser sanctions. As to Rule 37(f), SCRCP—which limits sanctions for ESI lost through the routine, good-faith operation of an electronic information system—the court recognized that Petitioner's expert's explanation "could

amount to routine, good-faith operation under appropriate circumstances,” but treated the issue as one of credibility.

The decision collapses distinct inquiries that become critical when a sanction ends litigation. Discovery misconduct may justify a sanction; it does not, without more, justify every sanction. A conditional warning does not lower the standard for imposing terminal sanctions for different conduct that predates the warning. A finding that information is missing does not answer the critical question of whether it was lost through intentional destruction or routine electronic processes. And presumed prejudice does not determine its degree, whether it can be cured, or why it requires both default on Respondent’s claims and dismissal of Petitioner’s affirmative counterclaim. These issues implicate the legal limits of the court’s discretion when imposing the ultimate sanction; they are not merely requests for appellate courts to retry forensic facts.

Each question presented here was preserved before the Court of Appeals and renewed on rehearing. Petitioner challenged the proportionality of the terminating sanction and resulting prejudice in his opening brief at pages 21-23, 42-47, and 50, and on rehearing at pages 6-7 and 13-15; the treatment of the forensic evidence and Rule 37(f) at pages 29-36, and on rehearing at pages 9-11; the significance of the April 2023 conditional order and subsequent forensic production at pages 28-32, 38-41, and 47, and on rehearing at pages 8-13; and dismissal of his affirmative counterclaim at pages 45-46 and 50, and on rehearing at pages 14-15. The Court of Appeals affirmed on June 24, 2026, and denied rehearing on August 24, 2026.

#### **STATEMENT OF MATERIAL FACTS**

##### **A. The device dispute culminated in a specific, conditional order.**

The litigation arose from a 2013 dispute, on Twitter, over college football. Respondent alleged that, following the dispute, Petitioner attempted to blackmail him and later accused him

online of sexual misconduct; Petitioner denied those allegations and counterclaimed based on Respondent's later publications accusing Petitioner of extortion, bank fraud, and responsibility for another person's death by suicide. (R. 157-84 & 202-18.) Respondent sent Petitioner an ESI preservation letter on December 20, 2013, but did not pursue discovery concerning the electronic devices used during the relevant period until many years later.

In August 2020, a consent order permitted Petitioner initially to comply with Respondent's electronic-discovery request by identifying the electronic devices he had used during 2013. (R. 32.) Petitioner identified a 2013 MacBook Pro and an iPhone 5. (R. 52.) The parties thereafter were unable to agree on protections for privileged, private, or irrelevant material.

On March 28, 2022, the circuit court ordered delivery of the laptop to a neutral examiner and prescribed a forensic protocol governing the examination and protection of privileged and private material. (R. 51-58.) Petitioner challenged aspects of the protocol as impracticable and insufficiently protective, but his motion to alter or amend and attempted interlocutory appeal were unsuccessful. (R. 67-77 & 637-75.)

On April 28, 2023, the circuit court found Petitioner in civil contempt and ordered that he "shall fully comply with the March 28, 2022 Order of Judge Kinlaw within 45 days of this Order or shall be fined \$7500 and his Answer and Counterclaim shall be stricken and [Petitioner] shall be deemed in default." (R. 82.) The court described the remedy as a "rifle-shot" intended to compel compliance. (R. 81-83.) The order thus prescribed a specific condition, a deadline for satisfying it, and the consequence of failing to do so.

**B. The ordered forensic examination occurred and yielded substantial information.**

Within the 45-day compliance period, Petitioner delivered his laptop to the court-designated neutral examiner (Abrams) and voluntarily supplied his wife's laptop. (R. 1146 ¶ 5.)

Because the protocol prescribed by the order was “wholly inapplicable to whole disk encrypted hard drives,” Abrams obtained search terms from both parties and used them to identify potentially responsive material. (R. 1146-47 ¶¶ 7-8.)

The resulting examination identified more than four million files on Petitioner’s laptop, only 9,235 of which were responsive to the supplied search terms. (R. 1147-48 ¶ 10.) Abrams also located an intact backup of Petitioner’s iPhone 5 containing more than 200,000 messages, many related to the case, and reported that “the issue of the iPhone 5 may be resolved.” (R. 1147 ¶ 9.) The examination thus yielded substantial potentially responsive information rather than an empty or wiped drive.

Abrams later reported his “initial feeling” that “the Internet history and much of the content of the hard drive must have been erased in late 2016,” adding that “[t]here is still more analysis needed to settle this controversy” and that “[a]s a neutral, I may not be the best candidate to do that job.” (R. 1163.) The circuit court made no finding adopting that hypothesis. The parties’ forensic experts later addressed that distinct question, including evidence that a Safari software update automatically removed browser history predating September 2016. (R. 1329-30.)

Respondent nevertheless sought sanctions based in part on allegations that the laptop had been substituted or manipulated. On January 18, 2024, the circuit court declined to impose sanctions, finding that Respondent’s motion “raised some serious concerns over the validity of the laptop in question, but has not established the Defendant’s violation of the Court’s Order of April 28, 2023 at this time,” and that Respondent had been given an opportunity to submit additional evidence but “nothing was filed or presented to the Court.” (R. 85-87.)

**C. Subsequent forensic examinations did not establish that potentially relevant information was lost through a single act of intentional destruction.**

After Abrams completed the court-ordered examination, Respondent retained forensic examiner Watkins and Petitioner retained forensic examiner Finch. Although the experts disagreed on their ultimate conclusions, their analyses established important distinctions. (R. 1237-52 & 1320-33.)

First, Watkins acknowledged that a Safari update automatically deleted browsing history predating September 2016. (R. 1329-30 ¶ 5.)

Second, although a consolidated computer-command-history file had been intentionally deleted, the underlying command records remained elsewhere. Watkins acknowledged that the deletion did not remove those records, their timestamps revealed no suspicious gaps, and he found no definitive evidence of selective deletion. (R. 1331 ¶ 8 & 1332 ¶ 11.)

Third, Finch found that the forensic software Abrams used could have altered certain timestamps, an explanation Watkins acknowledged “may be correct.” (R. 1252-54 & 1331-32.)

Both experts also agreed that the laptop’s hard drive had not been erased or replaced; it contained millions of files reflecting consistent use throughout the relevant years. (R. 1247-49.)

The circuit court nevertheless found that Petitioner willfully destroyed or removed relevant evidence while acknowledging that it “cannot determine at what point this data was removed or destroyed” and that “the timing cannot be determined.” (R. 99-101.) The unresolved mechanism matters: automatic deletion, intentional deletion, and anomalies potentially caused by the forensic process present different questions of culpability, prejudice, and Rule 37(f).

**D. The court’s terminating sanctions order rested on grounds other than failure to satisfy the condition established by the April 2023 order.**

The February 26, 2025 order imposed the sanctions conditionally prescribed in April 2023—a \$7500 fine and striking of Petitioner’s answer and counterclaim. (R. 104-05.) But it did not find that Petitioner failed timely to deliver the laptop or that the ordered forensic examination had not occurred. Instead, it relied on four other grounds: failure to maintain device integrity after the December 2013 preservation letter; failure to identify and produce other devices; delay associated with motions and appeals; and a later instant-message exchange with a third party. (R. 102-03.)

At the January 2025 hearing, Respondent’s counsel expressly distinguished the prior conditional order from “other discovery misconduct” and urged the court to apply the previously threatened sanction to any such misconduct it found. (R. 247.) The February order effectively did so. It characterized a spoliation instruction as a “mere tap on the hand” and reasoned that anything less than the previously threatened sanction would diminish the court’s authority. (R. 104.) The prior warning thus became the bridge to terminating sanctions for conduct other than violation of the condition that triggered the warning.

**REASONS FOR GRANTING THE WRIT**

Certiorari is warranted under Rule 242(b)(1) and (3), SCACR. This case presents novel questions of South Carolina law and a decision difficult to reconcile with this Court’s decisions governing terminating discovery sanctions. Rule 37(f), SCRCP, was adopted in 2011 but has never been construed in a published South Carolina appellate decision. The decision below appears to be its first appellate application in this State, but, as an unpublished decision, supplies no precedential guidance. See Rule 268(d)(2), SCACR. These questions of first impression were thus resolved in a per curiam opinion issued without oral argument. See Rule 215, SCACR. This

Court recently granted certiorari from another unpublished decision affirming terminating sanctions under Rule 37(b)(2)(C) and published the Court of Appeals’ analysis as its own. Innovative Waste Management, Inc. v. Crest Energy Partners GP, LLC, 445 S.C. 19, 22, 911 S.E.2d 406, 407 (2025) (adopting “the well-reasoned opinion of the court of appeals and tak[ing] this opportunity to publish it”), aff’g Op. No. 2023-UP-126, 2023 WL 2671712 (Ct. App. 2023). Nor has a South Carolina appellate court addressed the legal effect of satisfying the condition attached to a threatened terminating sanction.

The decision also implicates settled limitations on terminating sanctions. This Court has held that dismissal is “too severe if there is no evidence of any intentional misconduct,” Orlando v. Boyd, 320 S.C. 509, 511-12, 466 S.E.2d 353, 355 (1996), and has reversed an evidentiary sanction where the trial court “made no specific finding of prejudice,” Barnette v. Adams Bros. Logging, Inc., 355 S.C. 588, 593, 586 S.E.2d 572, 575 (2003). More generally, sanctions must reflect an actual exercise of discretion governed by law rather than the mere existence of discretion. See Morris v. BB&T Corp., 438 S.C. 582, 585-87, 885 S.E.2d 394, 396-97 (2023); Balloon Plantation, Inc. v. Head Balloons, Inc., 303 S.C. 152, 154-55, 399 S.E.2d 439, 440-41 (Ct. App. 1990). The case additionally presents the distinct question of whether an affirmative counterclaim may be extinguished without determining how the particular discovery misconduct prejudiced the opposing party’s ability to defend that claim.

This Court’s recent decisions affirming terminating discovery sanctions reinforce rather than diminish the need for review. In Innovative Waste Management, 445 S.C. 19, 911 S.E.2d 406, this Court affirmed the striking of an answer and counterclaims after years of missed discovery deadlines, violations of orders compelling discovery, prior sanctions, and ultimately willful noncompliance with specific discovery orders. Significantly, the Court distinguished that

sanctionable conduct from the pursuit of protective orders and other procedural challenges, agreeing that those filings were not themselves grounds for sanctions. Id. at 30, 911 S.E.2d at 411. Welch v. Advance Auto Parts, Inc. likewise affirmed termination where a party was “emphatic that it did not intend to comply” with its discovery obligations. 445 S.C. 640, 656, 916 S.E.2d 320, 328-29 (2025), cert. denied sub nom. Atlas Turner, Inc. v. Welch, 223 L. Ed. 2d 544 (2026). Those decisions illustrate the conventional case for termination: an identified discovery obligation, continued noncompliance with that obligation, and resulting prejudice. This case asks whether the same result may follow where the ordered forensic examination occurred, substantial information was produced, and the terminating order instead aggregated different conduct without determining the prejudice attributable to that conduct or whether lesser sanctions could cure it.

The questions are recurring and important. Conditional “comply-or-be-stricken” orders are a familiar means of compelling discovery. ESI is now commonplace in ordinary civil litigation, and routine software processes may delete information without a user affirmatively selecting it for destruction. Yet South Carolina law presently supplies no published appellate guidance concerning the effect of satisfying the condition attached to a threatened terminating sanction or the analysis Rule 37(f) requires when allegedly lost ESI includes information removed through automatic software processes.

This case is also an unusually good vehicle. The sanction is terminal; the order states its rationale; the issues were presented below; and the record contains the forensic evidence necessary to resolve the legal questions. Review does not require this Court to become a forensic factfinder. The questions concern what analysis must precede a sanction that extinguishes a litigant’s claims and defenses—not which forensic examiner was more persuasive.

## ARGUMENT

### **I. RULE 37(f) REQUIRED THE COURTS BELOW TO DISTINGUISH AUTOMATIC DATA LOSS FROM INTENTIONAL DELETION.**

Rule 37(f), SCRCP, provides that “[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.” The rule is a limitation on the sanctioning power rather than a factor bearing on its exercise: absent a finding of exceptional circumstances, a court may not impose sanctions for such a loss at all. The distinction the rule draws is straightforward: information may be lost because a user deliberately deletes it or because ordinary software processes delete it automatically. Rule 37(f) requires courts to distinguish between the two. The February 2025 order contains no such finding. The phrase “exceptional circumstances” appears nowhere in it, and the order neither cites nor discusses Rule 37(f). (R. 94-106.)

That distinction mattered because the forensic evidence identified different mechanisms of loss. First, Respondent’s expert acknowledged that some internet-browsing history disappeared automatically when the browser software was updated. (R. 1329-30 ¶ 5.) Automatic deletion presents a Rule 37(f) question; evidence establishing when information disappeared does not by itself establish that a user intentionally deleted it.

Second, a consolidated computer-command-history file was deleted, and Respondent’s expert attributed the deletion to deliberate user action. (R. 1331 ¶¶ 8, 10.) Petitioner does not contend otherwise here. But the inference drawn from that file—that Petitioner destroyed evidence that would have proved Respondent’s case—does not follow from it. The same expert found that the underlying session records remained, that “the regular timestamps and lack of gaps in the history suggest [selective deletion] might be unlikely,” and that selective deletion could not be

established without forensic artifacts he did not have. (R. 1332 ¶ 11.) Neither the expert nor the court explained how the deletion of a command-history file bears on the 2013 communications Respondent sought. And the laptop retained extensive material unfavorable to Petitioner, which is difficult to reconcile with a purge undertaken to defeat discovery.

Third, some apparent timestamp irregularities appear to have resulted from the forensic examination itself—an explanation Respondent’s expert acknowledged “may be correct.” (R. 1331-32.) Both parties’ experts also agreed that the laptop’s hard drive had not been erased or replaced. (R. 1247-49.)

The order called all three forensic submissions convincing without reconciling them. Abrams’s erasure hypothesis was refuted by Respondent’s own expert, who found that metadata for 3,651,601 files showed routine use from 2013 through the end of 2017 and “suggests that the computer hard drive was not erased or replaced.” (R. 1242 ¶ 23.b.) Petitioner’s expert said so expressly: “Mr. Watkins seems to refute the claim of Mr. Abrams that content must have been erased.” (R. 1248.) That is the most likely explanation for why the court “cannot determine at what point this data was removed or destroyed.” (R. 100-01.)

These mechanisms present different legal questions. Automatically deleted browser history implicates Rule 37(f); an intentionally deleted file presents a different culpability question; and an anomaly created by forensic software is not destruction by Petitioner at all. A general credibility determination cannot substitute for determining which mechanism caused which loss.

The Court of Appeals recognized that the automatic-deletion explanation “could amount to routine, good-faith operation under appropriate circumstances,” yet treated the issue as one of expert credibility. But credibility determines what happened; Rule 37(f) determines the legal consequence of what happened.

The credibility determination to which the Court of Appeals deferred is not one this record could produce. The sanctions motion was heard on January 24, 2025 by video conference, on argument of counsel; the reporter's index lists no witnesses and no exhibits. (R. 219-20.) Neither Abrams, nor Watkins, nor Finch was sworn, examined, or observed by the circuit court, and the record contains no other transcript. The courts below assessed the experts entirely on their affidavits and reports.

That distinction is not incidental to the authority on which both courts relied. In QZO Inc. v. Moyer, the trial court “heard Appellant’s testimony and found it lacked credibility,” and “commented at the hearing” that the appellant’s explanation for noncompliance was “a great mysterious sequence of coincidences that strain credulity.” 358 S.C. 246, 257, 594 S.E.2d 541, 547 (Ct. App. 2004). It was on that footing that the court observed that “[w]hen, as here, there is conflicting evidence on an issue, it is up to the court as trier of facts to judge credibility.” Id. The February 2025 order borrowed that phrase and applied it to “the affidavit submitted by [Petitioner’s] expert.” (R. 103.) What described a witness the QZO court had watched testify was made to describe a document. The same is true of the authority on which QZO itself rested. Halbersberg v. Berry—cited in the February 2025 order alongside QZO for the proposition that “when there is conflicting evidence, it is up to the judge to determine the credibility”—was an accounting tried to a master who heard the witnesses. 302 S.C. 97, 394 S.E.2d 7 (Ct. App. 1990). Even the court-appointed accountant testified there, on direct examination and subject to objection. Id., 302 S.C. at 103, 394 S.E.2d at 11. The credibility language appears in that case because “the master as the trier of the facts was the best judge of the credibility of the witnesses.” Id., 302 S.C. at 101, 394 S.E.2d at 10. Neither decision supplies a rule for choosing among affidavits from experts no one has seen or heard.

QZO differs in two further respects. There, the erasure itself was not in dispute: the computer was surrendered seven days after a temporary restraining order directing its immediate surrender, and “it became clear that the hard-drive had been formatted the day before.” 358 S.C. at 251, 257, 594 S.E.2d at 544, 547. The conflicting evidence concerned only the appellant’s reasons for the delay. Here, the experts disagree about whether anything was intentionally deleted at all. And the chronology is reversed: QZO involved a wipe during the life of an order, while the loss here is placed years before any order existed, on a drive both experts agree was neither erased nor replaced.

Deference to a credibility finding is a function of the fact-finder’s opportunity to see and hear the witness. Deference is owed “[b]ecause the appellate court lacks the opportunity for direct observation of the witnesses.” South Carolina Dep’t of Social Servs. v. Forrester, 282 S.C. 512, 516, 320 S.E.2d 39, 42 (Ct. App. 1984). This Court has put the same premise in conditional form: “[b]ecause the trial court’s findings . . . rest largely on his evaluation of demeanor and credibility, those findings are given great deference.” Sumpter v. State, 312 S.C. 221, 224, 439 S.E.2d 842, 844 (1994). And where testimony reached the trial court other than live, the Court of Appeals has said that the mode of presentation “places us in an equal position to judge” the witness’s credibility. Macaulay v. Wachovia Bank of S.C., N.A., 351 S.C. 287, 296, 569 S.E.2d 371, 376 (Ct. App. 2002) (testimony “presented through video deposition”). Where the fact-finder saw and heard no one, there is no such finding for a reviewing court to defer to, and the appellate court considers the same paper record from the same position. Whatever the circuit court did in choosing among three forensic submissions, it was not the kind of determination that supplies the deference the decision below accorded it. Petitioner does not ask this Court to reweigh the forensic evidence. He asks it to recognize that the sole ground on which the Court of Appeals rejected his Rule 37(f) argument—

that “the credibility of the affiants was for the circuit court”—is unavailable on a record in which no affiant was ever heard.

Nor does Petitioner’s preservation obligation make Rule 37(f) disappear; it makes the Rule’s “good faith” requirement important. The circuit court could have found that allowing an automatic deletion process to continue after a preservation duty arose was not good faith. It could have found exceptional circumstances permitting sanctions notwithstanding automatic operation. But it had to make that determination. The February 2025 order made neither finding. (R. 94-106.) Nor is a failure to preserve the same thing as destruction. What Respondent’s expert describes is an omission—a failure to anticipate that a browser update would enforce a retention policy, and to back up the data before it did. That is a different act from wiping a drive, and it turns on knowledge of which software updates delete which data. Rule 37(f) exists to separate the two.

That omission is particularly significant because the circuit court acknowledged that it “cannot determine at what point this data was removed or destroyed” and that “the timing cannot be determined.” (R. 100-01.) Where the evidence identifies different mechanisms of loss, Rule 37(f) requires the court to determine which loss is attributable to which mechanism before imposing sanctions for that loss.

No published South Carolina appellate decision has construed Rule 37(f), and the unpublished decision below supplies no precedential guidance. This case therefore presents a clean opportunity to establish the governing analysis without requiring this Court to choose between forensic experts. The question is what legal analysis Rule 37(f) requires once the relevant forensic facts are identified.

**II. THE APRIL 2023 CONDITIONAL ORDER COULD NOT SUBSTITUTE FOR A FRESH EXERCISE OF DISCRETION AS TO DIFFERENT MISCONDUCT.**

The April 28, 2023 order was not an open-ended warning that any future discovery dispute would cost Petitioner his pleadings. It imposed a specific condition and consequence. Petitioner was to “fully comply with the March 28, 2022 Order of Judge Kinlaw within 45 days” or incur a \$7500 fine and the striking of his answer and counterclaim. (R. 82.) The court described the remedy as a “rifle-shot” intended to compel compliance. (R. 81-82.)

What followed therefore matters. Petitioner timely delivered his laptop to Abrams and voluntarily supplied his wife’s laptop. (R. 1146 ¶ 5.) Abrams conducted the forensic examination, adapting the prescribed procedure because he “could not follow the recipe set forth in the Order” on the encrypted drive. (R. 1146-48.) The examination yielded millions of files, thousands responsive to the parties’ search terms, and an intact iPhone backup. (R. 1147-48.)

This argument does not require a declaration that Petitioner perfectly complied with every discovery obligation imposed during years of litigation. The narrower point is enough: the laptop was timely delivered, the neutral examiner conducted the ordered examination, and substantial responsive material was recovered. The court therefore had to determine whether the condition attached to the April 2023 sanction had nevertheless been breached. If not, different misconduct had to be evaluated on its own terms to determine whether it independently justified termination.

The circuit court had already answered that question. On January 18, 2024—eight months after the compliance deadline and thirteen months before the sanction—the same judge found that Respondent’s motion “raised some serious concerns over the validity of the laptop in question, but has not established the Defendant’s violation of the Court’s Order of April 28, 2023 at this time,” and that Respondent had been afforded an opportunity to submit further evidence but “nothing was filed or presented to the Court.” (R. 87.) The February 2025 order identifies no conduct occurring

after January 2024 and does not explain what changed. The Court of Appeals’ opinion does not mention the January 2024 order.

The February 2025 order imposed precisely the sanctions conditionally prescribed in April 2023. (R. 104-05.) But it relied on different grounds: failure to maintain device integrity after the 2013 preservation letter; failure to identify or produce other devices; delay associated with motions and appeals; and the later instant-message exchange. (R. 102-03.) Whatever sanctions those matters might support, none constitutes a finding that Petitioner failed timely to submit the laptop for the ordered forensic examination. Each also required findings of its own. The order faults Petitioner for having “finally indicated that he no longer had the iPhone which he had agreed to produce, but that the data was stored on his computer” (R. 102)—a representation the neutral examiner confirmed when he located the 2013 iPhone backup on the laptop and reported that “the issue of the iPhone 5 may be resolved.” (R. 1147 ¶ 9.) It faults him for not producing “the device(s) accessed remotely as identified in Watkins affidavit,” (R. 102), but the paragraph it relies on identifies no device. It reports SSH and Telnet commands, and explains that such commands are used to reach “other computer systems, routers, switches, firewalls, wireless access points, network attached storage devices . . . servers, Internet of Things devices, virtual private network gateways, etc.” (R. 1238-39 ¶ 19.) No finding identifies what type of device was accessed. It suggests the possibility that Petitioner used a secret device but cannot foreclose the possibility that it was something as innocuous and mundane as a “router” or a “wireless access point.”

The chronology further illustrates the problem. The February 2025 order relied in part on Petitioner’s handling of electronic information after the December 2013 preservation letter and treated the condition of devices and data years later as part of a continuing “pattern of deception.” (R. 99-103.) But the first order governing identification and production of electronic devices was

not entered until August 2020, and the forensic-production order followed in March 2022. (R. 32, 51-58.) Pre-order conduct may support preservation or spoliation sanctions if the governing standards are satisfied; it cannot constitute disobedience of orders that did not yet exist. Yet the terminal order did not distinguish evidence allegedly lost before those orders from evidence lost afterward, identify which loss violated which obligation, or determine the prejudice attributable to each. It instead aggregated preservation issues, discovery disputes, and later misconduct into a single course of conduct supporting termination. The Court of Appeals held that the destruction and device-integrity findings “were independent and separate findings by the circuit court and they were not conflicting.” If they are independent and separate, each required its own determination of which obligation it violated and what prejudice followed from it.

The court’s reliance on delay requires the same precision. Petitioner unsuccessfully challenged discovery orders he maintained were impracticable and insufficiently protective, and those challenges caused delay. But Innovative Waste Management distinguishes procedural challenges to discovery from separate sanctionable noncompliance with discovery obligations. 445 S.C. 19, 911 S.E.2d 406 (2025). The relevant question was therefore what delay resulted from noncompliance, what prejudice that delay caused, and what sanction that prejudice justified. The February 2025 order instead treated the passage of time associated with “[m]otions and [a]ppeals” as part of the cumulative justification for striking Petitioner’s pleadings. (R. 102-04.) Unsuccessful procedural challenges may inform the litigation history; they do not themselves constitute a discovery violation or establish the prejudice and proportionate sanction attributable to separate noncompliance.

The circuit court’s reasoning demonstrates the problem. It rejected a spoliation instruction in part because fines and striking had previously been threatened and reasoned that doing less

would diminish the authority of the earlier order. (R. 104.) “The Court issued a very strong caveat in its Order of April 28, 2023 finding a willful violation and stating that failure to comply within 45 days would result in a fine of \$7,500.00 and striking of Defendant’s Answer and Counterclaim. To do anything less at this point, more than twenty-one months later and in view of the egregious conduct of the defendant would only diminish the authority of this Court and its Order.” (R. 104.) The existence of the threat, rather than an assessment of the conduct, supplied the reason for the sanction selected. And the mismatch runs deeper than the fact that the conduct sanctioned was not the conduct the threat was made to compel: every one of the four grounds the order identifies consists of conduct that had already occurred when the condition was set in April 2023. A conditional sanction cannot compel compliance with respect to conduct that is already complete. The prior warning thus became a reason not to impose a lesser sanction even though the terminating order did not identify failure to perform the specified forensic production as the operative violation. A conditional order must mean something to both the court and the litigant.

**A. Balloon Plantation and Morris require a present-tense exercise of discretion, not enforcement by inertia.**

Balloon Plantation is particularly instructive because it involved a conditional discovery order followed by default and striking of a counterclaim. 303 S.C. at 153-55, 399 S.E.2d at 440-41. The Court of Appeals reversed because the sanction was unduly harsh and because the judge treated the earlier order as dictating the result rather than exercising discretion independently. Id. The error here is the mirror image. The circuit court did not say the April 2023 order mechanically required termination. It treated the existence of the prior threat as a reason why imposing less would diminish the court’s authority. (R. 104.) Either way, the prior order displaces the present-tense exercise of discretion required to select the appropriate sanction.

Morris v. BB&T Corp. supplies the broader principle: abuse-of-discretion deference presupposes an exercise of discretion according to law. The court must begin with a correct understanding of the law, analyze the relevant circumstances, and reach a ruling supported by that analysis. 438 S.C. 582, 585-87, 885 S.E.2d 394, 396-97 (2023).

Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997), applies that principle to discovery sanctions directly. The trial judge there “correctly framed the issue as discovery abuse,” but “did not weigh the required factors,” and “[a] failure to exercise discretion amounts to an abuse of that discretion.” Id., 329 S.C. at 112, 495 S.E.2d at 216 (quoting Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987) (“When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred.”)). An abuse of discretion likewise “occurs when the trial court’s ruling is based on an error of law.” Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

Here, that required determining whether the condition imposed by the April 2023 order was breached, what different misconduct remained if it was not, what prejudice that misconduct caused, and what sanction that prejudice justified. The court instead moved from an accumulated history of discovery disputes to the sanction already held in reserve.

**B. The cases affirming termination involve the sequence missing here: warning followed by the warned-against noncompliance.**

Griffin Grading & Clearing, Inc. v. Tire Service Equipment Manufacturing Co. illustrates the conventional sequence: six motions to compel and four orders were followed by attorney’s fees, a contempt hearing, a “clear and explicit warning,” and continued failure to provide meaningful discovery. 334 S.C. 193, 197-99, 511 S.E.2d 716, 719 (Ct. App. 1999). The trial court emphasized that the defendant received a clear warning of the consequences of continued

noncompliance and “yet the defendant has done just that.” *Id.*, 334 S.C. at 199, 511 S.E.2d at 718-19. The warning supported termination because the warned-against conduct continued.

Here, Petitioner was warned that failure to comply with the March 2022 forensic-production order would result in striking. He timely delivered the laptop, and the ordered examination occurred. He was not comparably warned that later findings concerning browser-history retention, another device, or an instant-message exchange would independently trigger the same sanction.

To be clear, this does not require endless warnings or immunize later misconduct. Different conduct may independently warrant termination. But it must independently warrant termination. An earlier conditional warning cannot substitute for determining whether the different misconduct, the prejudice it caused, and the available lesser remedies justify that result.

**III. AN AFFIRMATIVE COUNTERCLAIM MAY NOT BE EXTINGUISHED WITHOUT DETERMINING HOW THE DISCOVERY MISCONDUCT IMPAIRED THE DEFENSE OF THAT CLAIM.**

The dismissal of Petitioner’s affirmative counterclaim makes the problem especially clear. The court did not merely prevent Petitioner from defending Respondent’s claims; it extinguished his counterclaim based on Respondent’s later publications accusing him of extortion, bank fraud, and responsibility for another person’s death by suicide—publications of July 2017 and February 2018. (R. 213 ¶¶ 78, 80 & 214 ¶ 82.) Those publications postdate the 2013 events underlying Respondent’s complaint by more than three years and precede any order governing Petitioner’s devices. That required determining what missing evidence impaired Respondent’s ability to defend that claim and why dismissal, rather than a sanction directed to the evidentiary gap, was necessary. Neither decision below separately made that determination.

Karppi v. Greenville Terrazzo Co. illustrates the principle. There, striking a cross-claim went beyond what was reasonably necessary to redress the discovery wrong and conferred a

windfall on the opposing party. 327 S.C. 538, 543-44, 489 S.E.2d 679, 682-83 (Ct. App. 1997). Even accepting Respondent’s strongest theory—that missing 2013 information could bear on a truth defense to Petitioner’s counterclaim—the causal inquiry remains. The court still had to identify the relevant missing information, determine how its absence impaired that defense, and explain why a lesser sanction could not neutralize the impairment.

The decision below thus permits presumed prejudice to determine its own degree and incurability, justify the harshest available sanction, and extinguish an affirmative claim without claim-specific analysis. Presumed prejudice may begin the sanctions analysis; it cannot end it.

**IV. PRESUMED PREJUDICE CANNOT SUBSTITUTE FOR THE REQUIRED DETERMINATION OF WHAT THE DISCOVERY LOSS ACTUALLY IMPAIRED AND WHY ONLY A TERMINATING SANCTION COULD CURE IT.**

A finding of discovery misconduct answers whether a sanction may be imposed; it does not answer which sanction the misconduct justifies. By treating prejudice as presumptive and the litigation history as sufficient to support termination, the courts below collapsed those inquiries. South Carolina law keeps them separate.

Dismissal under Rule 37(b)(2)(C) “is not mandatory,” and “[w]hatever sanction is imposed should serve to protect the rights of discovery provided by the rules.” Kershaw County Bd. of Educ. v. U.S. Gypsum Co., 302 S.C. 390, 395, 396 S.E.2d 369, 372 (1990). A terminating sanction is “harsh medicine that should not be administered lightly.” Davis v. Parkview Apartments, 409 S.C. 266, 282, 762 S.E.2d 535, 544 (2014) (quoting Griffin Grading, 334 S.C. at 198, 511 S.E.2d at 718). It must be reasonable, directed to the discovery misconduct, and no broader than necessary to foreclose a decision on the merits. See Balloon Plantation, 303 S.C. at 154-55, 399 S.E.2d at 440-41. In selecting the sanction, the court must consider not merely the existence of prejudice,

but its “degree.” Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 435, 673 S.E.2d 448, 457 (2009).

That framework requires a court contemplating termination to determine what discovery right was impaired, how seriously it was impaired, and why lesser sanctions cannot cure the resulting prejudice. A presumption of prejudice may establish the first; it cannot establish the second and third.

The Court of Appeals relied on Scott v. Greenville Housing Authority, 353 S.C. 639, 652, 579 S.E.2d 151, 158 (Ct. App. 2003), for the proposition that “when discovery rights are trampled, prejudice must be presumed.” But Scott was not a sanctions case. It was a Rule 36 case about whether a party could withdraw deemed admissions—a standard that turns expressly on prejudice to the party who obtained them. The sentence immediately following the one the panel borrowed states the function the presumption performs: “Unless the party who has failed to submit to discovery can show lack of prejudice, reversal is mandated.” 353 S.C. at 652, 579 S.E.2d at 158; accord Samples, 329 S.C. at 114, 495 S.E.2d at 217. The presumption allocates the burden on appeal. It has never supplied the prejudice finding a circuit court must make before selecting a terminating sanction, and this Court has identified the degree of prejudice as a distinct consideration in that selection. Historic Charleston Holdings, 381 S.C. at 435, 673 S.E.2d at 457. A presumption may therefore establish some prejudice; it cannot determine how much remained, whether the missing information was otherwise available, whether the harm could be cured, or why default was necessary.

Welch does not collapse those inquiries. There, the prejudice concerned “the very right to discovery itself” where the sanctioned party was “emphatic that it did not intend to comply.” 445 S.C. at 656, 916 S.E.2d at 328-29. Here, the ordered forensic examination occurred and produced

millions of files, thousands responsive to the parties' search terms, and an intact phone backup containing more than 200,000 messages. The question is therefore not whether Respondent suffered some prejudice from discovery misconduct, but what material prejudice remained after that production, its degree, and why nothing short of termination could cure it.

Barnette and Kershaw County reinforce the point. Barnette reversed a discovery sanction where the trial court "made no specific finding of prejudice to the respondents." 355 S.C. at 593, 586 S.E.2d at 575. And Kershaw County demonstrates that even a preservation violation does not dictate dismissal: an adverse inference could protect the affected party, while termination "would have been too severe." 302 S.C. at 394-95, 396 S.E.2d at 371-72.

That inquiry mattered here. The neutral examiner recovered more than four million files, including 9235 responsive to the parties' search terms, and an intact iPhone backup containing more than 200,000 messages. (R. 1147-48.) The experts agreed that the hard drive had not been erased or replaced. (R. 1247-49.) And although a consolidated computer-command-history file had been deleted, Respondent's expert acknowledged that "deletion of the '.bash\_history' file does not directly delete the session files" and conceded he could not "definitively determine whether such files were purged." (R. 1331 ¶ 8 & 1332 ¶ 11.)

The circuit court nevertheless found that Petitioner's conduct "severely hamper[ed]" Respondent's ability to prove his case. (R. 104.) But characterizing prejudice as severe is not the same as identifying its scope or determining whether it is curable. The order does not identify with particularity what material evidence remained unavailable after the forensic production, how its absence impaired Respondent's ability to prove his claims, or why that impairment could not be cured by an adverse inference, evidentiary or issue sanction, fees, or another lesser remedy. Instead, it reasoned broadly that Petitioner had within his means information that could "clear

himself if he was not the publisher.” (R. 101.) That reasoning does not establish the degree to which Respondent’s ability to prove his claims was impaired. The order is in fact internally inconsistent on the point. It states that Petitioner “has not produced any of the requested information regardless of the reason,” (R. 101), and “still has not provided the requested information,” (R. 104), while elsewhere acknowledging that “the Defendant has provided access to one computer which has been analyzed by three separate experts.” (R. 99.)

The lesser-sanction analysis suffers from the same problem. The circuit court characterized a spoliation instruction as a “mere tap on the hand” and reasoned that doing less than the sanctions previously threatened would diminish the authority of the court and its order. (R. 104.) That measures the sanction against the court’s frustration with the litigation, not against the prejudice the sanction was supposed to cure. An adverse inference can resolve factual uncertainty created by missing evidence; an evidentiary or issue sanction can prevent the responsible party from benefiting from that loss; and fees can compensate unnecessary expense. The question is not whether those sanctions were sufficiently punitive, but why none could protect the discovery right actually impaired. Neither decision below answers it.

#### **CONCLUDING STATEMENT**

For these reasons, Petitioner respectfully requests that the Court grant the petition for writ of certiorari on the Questions Presented. Upon review, Petitioner will request reversal of the Court of Appeals, vacatur of the orders from which this appeal is taken, and remand for further proceedings consistent with this Court’s decision.

Respectfully submitted,

*s/ Steven Edward Buckingham*

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September 22, 2026